Supreme Court, U.S.
FILED
JAN 26 2001
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(2)

No. 00-1052

IN THE
# Supreme Court of the United States

UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA,
*Petitioner*,

v.

TAMPA ELECTRIC COMPANY, FLORIDA POWER & LIGHT COMPANY, and FLORIDA POWER CORPORATION,
*Respondents*.

**On Petition For a Writ of Certiorari to the Supreme Court of the State of Florida.**

## FLORIDA POWER CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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22 pp

## CORPORATE DISCLOSURE STATEMENT

Florida Power Corporation is wholly owned by Progress Energy, Inc.

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## STATEMENT OF THE CASE

This case involves a straightforward application of the Florida Electrical Power Plant Siting Act (the "Siting Act"). Unlike many states, Florida has not yet deregulated its electric utility industry (although, as discussed below, the State is studying the issue at this time). Under existing law, only authorized electric utilities in Florida may legally sell electric power at retail to consumers in the State.

When a regulated utility determines that it needs additional generating capacity to serve its retail load, the utility may construct a new facility or it may contract to buy such power at wholesale. If the utility wants to build, or contract with a wholesale supplier to build, a large electric power plant—i.e., a power plant with a steam component of 75 megawatts ("MW") or more—the utility must get approval to site the power plant under the Siting Act. By this means, the Florida Legislature has sought to ensure that electric utilities obligated to serve customers in Florida may obtain approval to build power plants to meet their need for reliable generating capacity, while protecting against an unwarranted proliferation of large electric power plants detrimental to the State's fragile environment. *See* Fla. Stat. § 403.502 (2000).

To proceed under the Siting Act, an investor-owned utility like Florida Power Corporation must issue a request for proposals to solicit bids from wholesale power plant developers. *See* Fla. Admin. Code § 25-22.082(2). This provides a competitive point of entry to all in-state or out-of-state wholesale providers. The utility then has the obligation under State law to select the most cost-effective proposal to meets its generating needs. *Ibid.*; Fla. Stat. § 403.519 (2000). Thus, a utility may not pass up competitive options in the wholesale market unless the utility is able to propose a *more* competitive self-build alternative.

To get approval to build a plant, the utility must show that it actually needs the plant to serve identified retail load and that the plant will thus not impose an *avoidable and unwarranted* impact on the State's environment. *See* Fla. Stat. § 403.519 (2000); *see also* §§ 403.502(3), 403.507(2)(a)(2), & 403.508(3) (2000). Contrary to Petitioner's unsubstantiated assertions, there is no indication in the record in this case or in the legislative history of the Siting Act that the law was enacted to protect the economic interests of Florida utilities. The Siting Act restricts the development of *all* large power plants in the State, whether built by in-state utilities or out-of-state power plant developers.

The law was developed by the Florida House Environmental Protection Committee to ensure that utilities did not "go[] out and build[] any power plants [they] don't need," and to require Florida regulators to "balance the considerations of the need for additional power with . . . ecological considerations." (Rep. Andrews, Chair of Subcommittee on Permits of the House of the Environmental Protection Committee; R9-1765-1821). To achieve this purpose, the Legislature ordained that the State must "make a determination that *there is in fact a need* that has to be served, and *then balance the ecological considerations* with that need." *Ibid.* (emphasis added). Thus, contrary to what Petitioner contends, the Florida need certification procedure is a crucial threshold step in effectuating the Siting Act's objective of protecting the State's sensitive environment against undue impact.

Florida utilities engage in ongoing planning concerning their system needs. To discharge their obligation to serve, Florida utilities must plan for electric generating capacity they can rely upon. In this connection, regulated electric utilities in Florida must maintain adequate "reserves" to

assure that they can serve their retail load in times of extreme weather, outages, or other exigencies. Under the long-standing policy of the Florida Public Service Commission ("PSC"), a utility may count toward its reserves only generating capacity that *it owns or has under firm contract*, to ensure that the capacity will be available to the utility when the utility actually needs it (thus avoiding the kind of power shortages occurring now in California and other parts of the country). (T3-417, 444, T4-537-38).

Accordingly, an applicant seeking approval to site a new power plant under the Siting Act must demonstrate that the plant will be utility-owned or contractually committed to meet the need for generating capacity that the proponent of the plant proposes to satisfy. This requirement applies across the board, whether the proposed plant will be developed by a Florida utility, a Florida independent power producer, or an out-of-state power plant developer. This requirement was not announced for the first time by the Florida Supreme Court in this case, but represents a long-standing interpretation of the Siting Act by the Florida PSC and the Florida Supreme Court. *See Nassau Power Corp. v. Deason*, 641 So. 2d 396 (Fla. 1994); *Nassau Power Corp. v. Beard*, 601 So. 2d 1175 (Fla. 1992); *In re: Petition of Nassau Power Corp.*, 1992 Fla. PUC LEXIS 1557, Order No. PSC-92-1210-FOF-EQ (PSC Oct. 26, 1992).

In this case, the Petitioner, Utilities Commission, City of New Smyrna Beach ("the City" or "Petitioner"), wanted to contract with Duke Energy New Smyrna Beach Power Co., Ltd., L.L.P. ("Duke") to build a 530MW power plant to meet Petitioner's 30MW need for additional generating capacity. (R1-15). Petitioner actually needed—and contracted for—only 30MW of the capacity and energy that would be produced by the much larger plant. Although Duke sought authority to build its plant based on its professed intent to

meet the needs of other load-serving utilities in Peninsular Florida, Duke made no effort to negotiate or enter into contracts with other load-serving utilities and, in fact, expressly refrained from doing so. (Exh. 2, ¶ A(4); T4-540, 546-49, 595). Accordingly, Duke and the City were unable to demonstrate that any other load-serving utility *actually needed the proposed plant* or that any other utility could count on the plant for reliable supply during power shortages.

Nonetheless, Duke and the City attempted to persuade—and ultimately did persuade—the PSC, by a 3-2 vote, to take it upon itself to depart from the long-standing precedent of the PSC and the Florida Supreme Court and permit Duke to site the plant based on speculation that Duke might be able to negotiate sales to unidentified load-serving utilities in Peninsular Florida after the plant was already built and had impacted the State's environment. In doing so, the PSC embraced the argument advanced by Duke and the Petitioner that existing Florida law authorized the siting of "merchant" plants—plants that are detached from any identified need of load-serving utilities or any commitment to meet their need. The role of merchant plants in a *deregulated* electric market lies at the center of the current controversy in California. *See* Oppel, Independent Plants Play Role In Electricity Troubles, *The New York Times*, (Jan. 23, 2001); Flanigan, Texas Power Suppliers Shun Bad Guy Label; Firms Say California Ignored Advice And Failed To Deal With The Realities Of A 'New' Economy, *Los Angeles Times* (Jan. 14, 2001); Tracy, Could Power Troubles Happen in Florida, Too?, *Orlando Sentinel* (Jan. 1, 2001).

With a 6-1 vote (with Anstead, J., dissenting) the Florida Supreme Court reversed, correctly determining that existing law did not authorize the siting of power plants that were not committed to serving identified needs of particular load-serving utilities: "The projected need of unspecified utilities

throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need . . . ." *Tampa Electric Co., et al. v. Garcia, et al.*, 767 So. 2d 428, 436 (Fla. 2000). Concluding that the PSC had put the cart before the horse in acting to approve the proposed Duke plant without statutory enabling authority, the court stated "that the Legislature must enact express statutory criteria if it intends such authority for the PSC." *Id.* at 435. The court rejected Petitioner's constitutional challenges based on its determination that Congress had expressly delegated to the states the authority for regulating the matters at issue in this case. *Id.* at 436.

Thereafter, the Governor of Florida established a broad-based Florida Energy 2020 Study Commission ("Study Commission") to evaluate and propose legislative changes in the electric industry to meet the needs of the State over the next 20 years. The Study Commission convened on September 13, 2000 to begin its work. *See* Meeting Minutes, Florida Energy 2020 Study Commission, Sept. 13, 2000, Tallahassee, Florida (http://www.myflorida.com/myflorida/communities/learn/agenda_sept00.html) (visited Jan. 16, 2001). Under its charge, the Study Commission must make its recommendations by December 1, 2001, for any legislative changes that it wishes to propose. The Study Commission has bifurcated its proceedings, however, and announced its intention to address as its first order of business the siting of wholesale generating plants. *See* Circelli, Competition In Electric Market Urged, *The Palm Beach Post* (Jan. 9, 2001). Depending upon the outcome of this legislative review, the current statutory framework, and the Florida Supreme Court's decision in this case, may be overtaken by events in the upcoming months.

## ARGUMENT

This case does not warrant plenary review by this Court. As the Florida Supreme Court correctly held, Congress has entrusted the states with the authority to regulate the matters at issue in this case. In rejecting Petitioner's constitutional challenge on this basis, the Florida Supreme Court faithfully followed long-settled precedent of this Court. Thus, the court's decision most assuredly does *not* conflict with controlling decisions of this Court; rather, it implements them.

Further, it is common knowledge that Congress, the Federal Energy Regulatory Commission ("FERC"), state legislatures, and state regulators all around the country are actively addressing the complex issues associated with deregulation of the electric industry through ever-changing legislation and regulation. *See, e.g.*, Wald, Negotiators Work on Plan For California Energy Trouble, *The New York Times* (Jan. 13, 2001); Yardley, Texas Learns in California How Not To Deregulate, *The New York Times* (Jan. 10, 2001). This is not an area—like antitrust—where Congress has long ago cast its directives in stone, leaving to this Court the responsibility to safeguard federal interests and ensure nationwide uniformity. The federal and state legislatures—within limits that were well-respected in this instance—are actively monitoring and adapting to evolving industry developments. In this regard, ongoing legislative developments in Florida may well overtake and eclipse the practical significance of the Florida Supreme Court's decision in this case. Indeed, Duke has not joined Petitioner in bringing this case to this Court. To the contrary, Duke has publicly stated that it "had no plans to file with a higher court" and instead was working with the Florida Energy 2020 Study Commission and the Florida Legislature to change the Siting Act. *See* Florida PSC Delays Until Dec. 27 Vote On

Four Merchant Plants, 3,158 MW, *Global Power Report* (Dec. 8, 2000).[1]

## I. Neither the National Energy Policy Act nor FERC Order 888 Preempts Florida's Siting Act.

Petitioner asserts that this Court should grant certiorari to review the decision below because the "Florida court's interpretation" of the Siting Act "is inconsistent with the goals and policies of federal law intended to promote competition in the United States electric utility industry," namely the Energy Policy Act of 1992 and FERC's Order 888. (Petition, at 11). Of course, this Court may not substitute its own interpretation of the Siting Act for that given by the Florida Supreme Court. *See Gurley v. Rhoden*, 421 U.S. 200, 208 (1975) ("a State's highest court is the final judicial arbiter of the meaning of state statutes"); *see generally Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). In any event, Petitioner's argument falls far short of the mark.

As a threshold matter, this Court has "frequently indicated" that " '[p]re-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits *no other conclusion*, or that the Congress has

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[1] In North Carolina, Duke's parent successfully supported a rule of law for siting new power plants like the rule in Florida challenged by the Petitioner in this case. *See Re Empire Power Co.*, Docket No. SP-91 (N.C. Utils. Comm'n Apr. 23, 1992), *aff'd sub nom. Empire Power Co. v. Duke Power Co.*, 437 S.E.2d 540 (N.C. Ct. App. 1993). North Carolina, like Florida, has created a study commission to evaluate whether, when, and how to introduce deregulation of the electric utility industry in that state. *See* Study Commission on the Future of Electric Service in North Carolina, Report to the 1999 General Assembly of North Carolina, 2000 Regular Session (http://www.ncuc.commerce.state.nc.us/electric/study1-.htm) (visited Jan. 18, 2001).

*unmistakably so ordained.*" ' " *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981) (collecting cases; emphasis added). By the same token, Petitioner may not prevail in its challenge by relying, as it does, upon the general "goals and policies of federal law." This Court has made plain that, "In cases such as this, it is necessary to look beyond *general expressions* of 'national policy' to specific federal statutes with which the state law is claimed to conflict," to find a "specific basis" to support a claim of preemption. *Id.* at 634, 636 (emphasis added).

Here, the City does not and cannot say that either the Energy Policy Act or FERC Order 888 expressly precludes the states from regulating the construction of new power plants in the way that Florida has, or in any other way for that matter. This is for good reason. Section 731 of the Energy Policy Act preserves state and local authority over the siting of facilities and environmental protection, as follows:

> Nothing in this title or any amendment made by this title shall be construed as affecting or intending to affect, *or in any way to interfere with*, the authority of any state or local government relating to environmental protection or the siting of facilities.

15 U.S.C. § 79, Historical and Statutory Notes (emphasis added).

Indeed, Petitioner's own policy witness, Martha Hesse, a former chairman of FERC, conceded at the hearing that the need proceeding in this case was exactly the kind of proceeding left by federal law to the states, and she refused to opine that federal law foreclosed the state-law approach that Petitioner challenges in this case, saying instead that federal law was *silent* on such matters. (T7-1006, T8-1020-25).

The fact is, the Energy Policy Act and FERC Order 888 did not mandate wholesale competition in all ways at all times,

regardless of state law, as the City would have this Court believe. Rather, in enacting the Energy Policy Act, Congress purposely focused its work on transmission access and exemption from federal securities regulation, leaving to the states their historic role of determining whether and in what circumstances new generation facilities might be needed and sited. Thus, Congress legislated in this area with a scalpel, not a meat-ax.

Sensitive to the long-standing division of federal and state authority over issues of transmission and generation, this Court rejected a far more compelling federal preemption challenge than the City's in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), a case on which Petitioner relies. In that case, the Court held that states were free to impose a broad *moratorium* on the construction of nuclear power plants on *economic grounds*, despite federal legislation—the Atomic Energy Act—that explicitly promoted nuclear energy. The Court stated, "There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." *Id.* at 221. The Court nonetheless held that "the states have been allowed to *retain authority over the need for electrical generating facilities* [] sufficient to permit a state so inclined to *halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings*." *Id.* at 216 (emphasis added). Further, the Court recognized that, since the states were "certainly free to make these decisions on a case-by-case basis, *a state is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases*." *Id.* at 215 (emphasis added). The Court observed, "*it should be up to Congress* to determine whether a state has misused the authority left in its hands." *Id.* at 216 (emphasis added).

Here, too, in the final analysis, amorphous arguments about a general federal policy of promoting wholesale competition must give way to the paramount and long-recognized interests of the State in ensuring the orderly development of power plants within its jurisdiction and its enforcement of comprehensive regulatory schemes designed to assure adequate and reliable electric service for its citizens. When and if Congress sees fit to regulate in this area itself, Congress will do so.

## II. The Commerce Clause Does Not Prohibit Application of the Siting Act to this Case.

Petitioner next contends that certiorari is warranted in this case because the "dormant" aspect of the Commerce Clause precludes the State from conditioning the development of new power plants by independent power producers on a demonstration that such plants are needed, as evidenced by contracts with retail utilities. This argument, too, does not merit plenary consideration by this Court.

The Commerce Clause, of course, does not expressly prohibit anything. Rather, it is an affirmative grant of lawmaking authority to Congress to "regulate Commerce . . . among the several States." U.S. Const. Art. I, Sec. 8, cl. 3. Thus, when Congress elects to confer upon the states the prerogative of regulating in a particular area, the Commerce Clause itself does not act to inhibit such state regulation. *E.g.*, *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980).

In this instance, Congress has plainly preserved to the states their traditional role of regulating the need for generating facilities and the terms upon which facilities may be sited. As discussed above, Section 731 of the Energy Policy Act specifically preserves state authority over the siting of facilities and the protection of the environment.

Further, this Court explicitly recognized in *Pacific Gas* that the "*[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.*" 461 U.S. at 205 (emphasis added); *see also id.* at 212 (referring to the states' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like"); *id.* at 194 (referring to "the exercise of [] historic state authority over the generation and sale of electricity"). *See also Monongahela Power Company*, 40 FERC ¶ 61,256 (Sept. 17, 1987) ("jurisdiction over the *capacity planning, determination of power needs, plant siting, licensing, construction,* and the operations of [power] plants ha[s] been deliberately withheld from [FERC's] control or responsibility" and "preserved [to] the States[]") (emphasis added). Accordingly, this is not a situation where Congress has—through inattention—omitted to regulate issues that should be off-limits to states under some "dormant" aspect of the Commerce Clause. Rather, this case involves an area of regulation that Congress has traditionally and consistently relegated to the states.

Even if Congress may be thought to have overlooked this area of regulation, however, and thus even if the "dormant" Commerce Clause may be thought to apply in this case, the Florida statute would readily survive constitutional scrutiny under this Court's well-settled precedent. The City contends, basically, that Florida law places Florida-regulated utilities in a favored position, making the need of those utilities determinative in a need proceeding. This Court rejected a similar challenge under the Commerce Clause in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

The Court in that case upheld a tax by the State of Ohio that applied to unbundled power marketing sales by an interstate gas distributor, but that exempted competitive sales

by in-state regulated utilities. The Court began by tracing the history of regulation in the gas and electric industries, observing that state regulation emerged in the early part of this century after "then-recent experiments with free market competition in the manufactured gas and electricity industries had dramatically underscored the need for comprehensive regulation . . . ." *Id.* at 288.

In sustaining Ohio's differential tax treatment of state utilities and interstate power marketers, the Court pointed out:

> Conceptually, of course, any notion of discrimination assumes a comparison of *substantially similar entities*. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.

*Id.* at 298-99 (footnote omitted; emphasis added). In that case, the Court recognized that regulated utilities provide "bundled" services that benefit smaller consumers. "While this captive market is not geographically distinguished from the area served by the independent marketers, it is defined economically as comprising consumers who are captive to the need for bundled benefits." *Id.* at 301. Although regulated utilities competed directly with power marketers for larger, non-captive customers, the Court held that Ohio was justified in treating them differently, "*giv[ing] greater weight to the captive market and the local utilities' singular role in serving it* . . . ." *Id.* at 304 (emphasis added).

The Court noted there, as in *Pacific Gas*, that "should intervention by the National Government be necessary, Congress has both the resources and the power to strike the

balance between the needs of the competitive and captive markets." *Ibid.* (emphasis added). Accordingly, the Court rejected the challenge of the power marketers to Ohio's regulatory approach. *See also Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 377, 395 (1983) ("the regulation of utilities is one of the most important functions traditionally associated with the police power of the States").

As in *Tracy*, the retail utilities in Florida are assigned a critical role in need proceedings not out of some purpose to favor their economic interests, as Petitioner asserts, but because they alone are statutorily obligated to serve the ultimate consumers in the State. The City nowhere *challenges the constitutionality of this exclusive retail service arrangement.* In fact, in its Petition, the City makes clear that it does "*not* imply any constitutional limit to the PSC's existing authority to regulate in-state retail utilities." (Petition at 29; emphasis added). Yet, it is on *account of the exclusive retail service provided by PSC-regulated Florida utilities* that any wholesale provider who seeks to meet the needs of this State *must* deal with those utilities. This is not economic protectionism, but a rational, incontestably proper means to regulate the provision of the vital service of electric power in a way that balances the need for a reliable power supply with the State's interests in protecting its environment.

Petitioner relies in this Court, as it did below, on this Court's earlier decision in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) invalidating under the Commerce Clause New Hampshire's directive that the owner of an *existing* hydroelectric plant that participated in a regional New England Power Pool alter its historic pattern of interstate *billing* in order to provide the economic benefits of its interstate power sales to New Hampshire. The utility had historically made most of its sales in Massachusetts and

Rhode Island, selling only 6 percent of its output in New Hampshire.

The *New England Power* case did not involve the states' traditional regulatory control over the development of, and need for, *new* generating facilities within a state. The case did not involve any local interest at all, except for sheer economics. *See id.* at 336, 339. Although the Court explicitly recognized that "Congress may use its powers under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy," *id.* at 340, the Court held that, with regard to the special area of hydroelectric energy, Congress explicitly preserved only those state laws *then* in existence at the time the Federal Power Act was adopted, *id.* at 341.

Unlike the situation in *New England Power*, what is at issue here is the State's exercise of its traditional power to regulate whether and in what circumstances *new* power plants may be built in this State. In enforcing the existing legislative scheme in this State, the Florida Supreme Court did not seek to serve some perceived economic interest, but rather to effectuate the important legislative determination that new power plants should not be constructed in Florida unless they are demonstrably needed.[2]

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[2] Petitioner contends that the need determination at issue here is "indistinguishable" from the "equally exclusionary" certification requirement struck down in *Buck v. Kuykendall*, 267 U.S. 307 (1925). (Petition at 23). Yet the language Petitioner quotes from *Buck* demonstrates the difference. There, the point of certification was the "prohibition of competition," whereas here the determination of need is made "with a view to . . . conservation." *Id.* at 315-16. For this reason, too, Petitioner is mistaken in contending that any burden imposed by this law on interstate commerce is unwarranted and unjustified.

## III. Further Judicial Involvement is Unwarranted.

Fundamentally, what is at issue in this case is the manner in which one state, Florida, is seeking to discharge traditional state prerogatives and responsibilities to ensure a reliable and adequate supply of electricity while protecting the State's sensitive environment. Congress and FERC have taken well-defined steps to alter the regulatory landscape in this industry, and Florida—like virtually every other state—is considering legislative change within its sphere of authority to adapt to a changing industry. In a case such as this, where this Court is called upon to assess, and to some extent anticipate, what Congress wants, it is the far better course to let Congress speak for itself, with the benefit of whatever action or inaction the various states may take in experimenting with different means to manage these complex issues.

The widely reported debacle in California makes clear that deregulation of the electric utility industry and the concomitant introduction of "wholesale competition" is a multifaceted issue—not a constitutional talisman—that courts are ill-equipped to handle. The subject is tailor-made for legislative hearings and initiatives, and this process is taking place in Florida at this time.

## CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Certiorari.

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